REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL DIVISION CRIMINAL APPEAL NO 60. OF 2018

(From Original Conviction and Sentence in Criminal Case S.O. No. 15 of 2018 of the Resident Magistrate's Court at Wanguru)

WILSON WAWERU WANJIRA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT:

This appeal arises from the decision or the proceedings before Wanguru Principal Magistrate's court Criminal case No. 15 of 2018. In the case the accused was charged with the offence of defilement contrary to section 8 (1) and (2) of The sexual offences act No. 3 of 2006. It was alleged that on the 13th day of May, 2019 at [particulars withheld] village Mwea East Sub county being Kirinyaga County the accused intentionally caused his genital organ to penetrate the genital organ of MWW a child aged 13 years.

In the alternative he was charged with the offence of indecent act with a child contrary to section 11 (1) of the sexual offences act number 3 of 2006 and it was alleged that on the 13th of May, 2019 at [particulars withheld] village Mwea East sub county within the County of Kirinyaga intentionally touched the vagina of MWW a child aged 13 years with his penis.

The appellant had pleaded not guilty not to charges and after a full trial he was convicted on the charge of defilement **contrary to section 8 (1) and 8 (3) of the sexual offences act no. 3 of 2006** (to be referred to as the act) and he was sentenced to life imprisonment.

The appellant was dissatisfied with both the conviction and sentence and filed this appeal which raises the **following grounds;**

1. That I pleaded not guilty to the charge while taking plea

2. That the learned trial magistrate erred in the law and acts by convicting and sentencing me considering contradictions tendered by prosecution witnesses while testified before the law court and recording of statements.

3. That the learned trial magistrate erred in law and facts while convicting and sentencing me considering that no (gene analysis) and seminal analysis conducted to verify whether any other individual could have done act. Hence prejudice to me.

4. That the learned trial magistrate erred in the law and fact while convicting and sentencing me while failing to consider that one of the witness who had recorded his statement and ought to be the key witness and primary source of the allegation was never brought to court by the prosecution for me to adduce and challenge hence invoking Section 5 (1) (b) of the Kenyan Constitution

5. T**hat** the learned trial magistrate erred in law and facts by convicting and sentencing me while not considering that the evidence tendered by the prosecution witnesses was not water tight and did not collaborate to give the maximum sentence of nature hence I was greatly affected.

6. That the learned trial magistrate erred in law and facts while convicting and sentencing me considering that I reiterated before the Honourable court that there existed a personal grudge with one of the witnesses who had recorded his statement and the same support by the issue that the same individual never appeared before the honourable court to tender his evidence.

The appellant prays that having been dissatisfied with the proceedings, conviction and the sentence the proceedings be set aside and a fresh re-trial be conducted.

That following the grounds of appeal the court to consider the psychological torture, difficulties, the hardship he is undergoing in custody and quash both the conviction and sentence and acquit him.

The state opposed the appeal and filed submissions through Mr. F.S. Ashimosi Assistant Director of Public Prosecutions dated 24th October, 2019, and the respondent prays that this appeal be dismissed with costs.

This appeal was disposed off by way of written submissions, the parties filed submissions and highlighted the same on 28th October, 2019.

I have considered the appeal and all the submissions filed. This been a 1st appeal this court has a duty to analyse and to re-evaluate afresh all the evidence adduced before the lower court and to draw a conclusion while bearing in mind that it neither saw and heard any of the witnesses when they testified and leave room for that. This was the holding in : **Okeno -versus- Republic (1972) EA 32** where the court of appeal set out the duty of the first Appellate court as follows;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination **(Pandya -versus- Republic (1957) EA (336**) and the Appellate Court own decision on the evidence. The first Appellate court must itself weigh conflicting evidence and draw its own conclusion, **(Shantilal M. Ruwala -versus- Republic (1957) E.A 570).** It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate's findings should be supported in doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses, and leave room for that. See **Peter's -vs- Sunday Post (1958) EA 424"**

This being the first Appellant court it is a duty to satisfy itself that the incidence of offence of defilement or in the alternative of committing an indecent act with a child were proved beyond any reasonable doubts.

In doing this I propose to first look at the Grounds of Appeal by the appellant.

This grounds can be summarized as;

1. Contradictions in the appellant's case.

2. Failing to call witnesses

3. Failure by the trial magistrate to consider that there existed a grudge between him and one of the witnesses who had recorded a statement and never appeared before the court to tender his evidence.

A summary of the evidence tendered,

The evidence which was tendered before the trial court was by PW1 (MW) who told the court that the time she gave evidence she was 13years old and in class six 6 at [particulars withheld] Primary School.

After a Voire Dire examination the court found that her level of understanding seems fairly good and proceeded to give a sworn evidence.

According to the witness, on 13th of May, 2018 at around 9p.m, she was at home when the appellant found her and told her to go to his house, where she told the court that she knew the accused, she saw him because there was electricity light and they talked. The appellant enquired where her dad was and she told him he was away. The accused requested her to accompany him to his house and she agreed because according to her, she trusted him and never expected or anticipated what accused would do.

She changed her mind and refused to accompany him, but appellant threatened her and forced her to accompany him to his house which was 30 feet away.

The appellant then lead her to his house and locked her inside. The appellant warned her not to scream and he kill her and kill himself. There was no one else in the house, the appellant locked the door, removed her clothes which she was wearing, that is a skirt, a blouse and a pant.

The appellant then did bad things to her, and when she wanted to scream he removed a knife on her, he removed his t- shirt and trouser and then lay on her on a mattress using his body and penetrated her. She said she felt pain, and after that she could not leave the house as it was at night.

Later at 1a.m when she was still in the house of appellant her dad went there. There were other people who had come with her father who told the appellant to open the house, the appellant refused. The complainant's dad entered the house through a

window by then she was under the mattress, as the appellant had covered her with it and threatened her.

Her dad (PW2) NW removed the mattress and saw her. He also opened the door and they went outside. The appellant was tied and was taken to the In charge who told them to proceed to Wanguru police station, and she was taken to Difather's hospital by her dad and a police officer.

On being examined by Dr. Kenneth Munyi a medical officer based at Kerugoya hospital, it was found that the complainant M.W.W was aged 13 years, at the time of examination no clothing was available she alleged to have been defiled by a person known to her. She was in good general condition. There was inflamed area over the chest, which was tender on touching. Both knees had bruises which were tender to touch. The age of the injuries was between 1 to 4 days. Blunt weapon was used and the degree of injuries was harm.

<u>On the genitalia,</u>

- No laceration was noted on Labia Majora and Minora.
- The vaginal wall and the vagina were reddened (inflamed).
- The hymen was freshly raptured.
- There was whitish vaginal discharge
- No pus cells seen, sperms seen
- Deposits of spermatozoa on urine
- Negative for H.I.V, Syphillis and pregnancy.
- Put on medication, PEP (Post exposure Propilaxis) antibiotics and pain killers.

He found that there was evidence of defilement, the patient had been seen at Difathers Health center where necessary tests were done.

PW2 was NW who was the complainants father. He told the court that the complainant MW is her daughter who at the time was aged 13 years, as she was born on 18th July, 2005 as per the birth certificate which was produced as P. Exhibit. 1. According to PW2 he knew the accused by name Waweru they come from the same village and he was his friend, and he used to give him work on his compound.

On the material day that is 13th May, 2018 at 2a.m he came home after picking miraa, his wife informed him that the complainant was missing and he started looking for her. After giving up, and was considering the next action, the appellant went to his house and stayed for a while then left. It is then that two people came and called him asking him where the complainant was, and upon telling them that he was looking for her, they told him that the child was in the house of Budi. That is the name the appellant is known with in the village.

He called his wife and told him to look for two women while he called nyumba kumi official and they proceeded to the house of appellant and told him to open. He entered the house of appellant through the window and he saw a mattress, which the appellant had used to cover the complainant with. He was using a torch and he touched the complainant's leg and told her to come out.

The appellant started struggling with him as he wanted to run away. The complainant opened the door and the others' entered. He cautioned them not to assault the appellant, he then alerted the In charge of the village, who directed him to take the complainant to the Police Station and he proceeded to Wanguru Police Station, where they reported they were issued with a P3 and took the complainant to Difathers hospital and then Kibibi.

Pw3 (BW) is the complainant's mother and she told the court that the appellant comes from the village and is known by the name Budi and used to frequent his home.

On the material day, she had gone to the market and returned home at around 8p.m and found her husband and enquired where her daughter was.

The husband (PW2) informed her that, the complainant was at her grandmother's place. He cooked and later at 1a.m, her husband woke her up and told her that the complainant had been found in the house of the appellant. They proceeded to the house of the appellant with other people. The appellant refused to open and PW2 kicked the window and entered. She stood at the window, and in aid of a touch he saw Budi who was covering the complainant with a mattress. He opened the door, and then called Nyumba kumi official and the In charge of the village.

In cross - examination she stated that she never reported a missing person, as she had been assured that she was at her grandmother's place where she usually sleeps.

APC Geoffrey Muthamia (PW4) who was an Administration police constable based at Tongonye AP Post on 14th of May, 2018 at around 5a.m. He was on duty when me members of the public and nyumba kumi official took the appellant to the police post together with the parents of the complainant in this case. He booked a report from the father of child WW that he had found her daughter sleeping in the house of appellant and raised the alarm and rescued the complainant from the house of the appellant. He accompanied the appellant and her parents to Difathers's dispensary, and after receiving the report from the

hospital, he escorted the appellant to Wanguru Police Station, and the complainant was referred to hospital for treatment.

PW5 Doctor Kennedy Munyi who examined the complainant and filled the P3 form.

Faith Maloba (PW6) who was a police constable attached to Wanguru Police station was the investigating officer in the case, and she told the court that on 14th May, 2018 she was assigned this case to investigate, she conducted investigations and found that the complainant was heading home from the grandmother's place when the appellant called her and they proceeded to his house where he locked the house and had penetrative sex with her.

Later she was rescued by her parents, who also managed to arrest the appellant, she referred her to hospital for treatment, a P3 form was filled an d the Doctor confirmed that defilement had taken place and she then charged the appellant.

The appellant was put on his defence and gave unsworn statement, his defence was that it is the wife of Julius who went with the child to his house and started screaming and he was arrested and charged.

Based on that evidence the appellant was convicted and sentenced as earlier stated.

The appellants argued ground 2 and 5 of the appeal together and he submits contradiction of evidence tendered by the prosecution and has pointed the evidence of PW1 and PW2. I have considered the submissions, I find that there are no material contradiction in the evidence of PW1 and PW2.

The minor contradictions pointed out have not shaken the prosecution case, and minor contradictions are ignored. Not all contradictions may lead to the weakening of the prosecution's case. Contradictions will only be immaterial if they raise doubts in the evidence of the witnesses.

The Court of Appeal in the case of**; ERIC ONYANGO ODENG –VERSUS- REPUBLIC (2014) eklr** while dealing with the issue of contradictions and inconsistencies, stated as follows;

> **"nor do we think much turns on the alleged contradictions and the time of the commission of the offence. The trial court after hearing all the evidence, accepted that the offence was committed about 7p.m in accordance with the evidence of PW2 as noted by the Ugandan Court of Appeal in Twehagane Alfred -versus - Uganda (Cr. Appeal No. 139 of 2001) 2003 UGCA 6. It is not every contradiction that warrant rejection of evidence.**

As the court put it: " **in regard to contradiction in the prosecution case the law has set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessary lead to the evidence of a witness been rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate and truthfulness or if they do not affect the main substance of the prosecutions' case."**

The appellant has said that there were contradictions on the time, PW1 has pointed out the contradictions which I find are not material and will not affect the credibility of witnesses, there is nothing to show that the witnesses were deliberately telling untruths. The issue of contradictions was not raised before the trial magistrate and there was no determination on alleged contradictions.

I find that there were no contradictions which were casted doubt in the prosecution's case. Minor contradictions are ignored and the ground is without merit.

The appellants' with Ground number 111 raised the issue that there was failure to consider by the trial magistrate the absence seminal / gene analysis of the accused.

He submitted that in criminal trials the prosecution has the burden of proof, being beyond a reasonable doubt that the accused person is responsible for the offence charged, and we therefore submit that it is desirable to connect the accused with the offence in question failing which the court must return a no guilty verdict.

In this case the offence being defilement the seminal analysis of the accused should have been conducted to prove that it was the accused who defiled the complainant. However, no such medical test was done in respect of the accused and hence the offence was not proved beyond any reasonable doubt.

I have considered the ground and I find that; in a charge of defilement what is supposed to be proved is evidence of penetration.

Seminal analyzes would be necessary where there is a dispute as to who has committed the offence. In this case there was overwhelming evidence from the complainant herself that it is the appellant who she knew before that defiled her. A fact that is collaborated by the testimony of PW2 and PW3 who confirmed before the trial court that they rescued the complainant from the house of the appellant in the wee hours of the night.

Furthermore, this case relates to the Commission of a Sexual offence under the Evidence Act the court can convict with the evidence of the complainant. This is provided under **Section 124** of the Evidence Act Cap 80 Laws of Kenya.

It provides;

"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

The complainant testified that the appellant penetrated her, the Judgment of the trial magistrate at **page 42, line 11** stated:

" I noted the demeanor of PW1 and to me she appeared credible and was consistent on how accused approached and requested her company to his house. I am not convinced that PW1 was brought to the scene by Julius's wife who started screaming.

Pw1 has convinced me she was locked inside the house, and this evidence has been corroborated by PW2 and PW3, PW1 claims she w as rescued from accused house and PW2 and PW3 have collaborated her evidence. I have not discerned any underlying issues between PW2 and PW3. I therefore find accused had penetrative sex with Pw1."

The trial magistrate made a finding of fact on the testimony of the complainant that she was a credible witness and it is noted from the record that, where she gave evidence after a Voire dire examination and the trial magistrate held that she could understand the proceedings and gave evidence on oath.

From the finding by the trial magistrate, which I find was based on cogent evidence, the identity of the perpetrator was not in dispute.

The proof of the identity of the perpetrator is one of the ingredients of the offences of defilement. In this case from the evidence tendered before the trial magistrate there was direct evidence to prove the identity of the perpetrator.

There was also cogent evidence which proved that there was evidence of defilement as testified by PW5.

Medical evidence corroborated the evidence of the complainant, in that her hymen was freshly broken, there was presence of spermatozoa and redding of the vaginal wall.

The age of the complainant was also proved in the production of the birth certificate Exhibit. 1.

I find that there was sufficient evidence on record to prove the identity of the perpetrator and therefore it was immaterial that the seminal fluids of the appellant were not tested and penetration is proved by Medical evidence and in this case there was sufficient medical evidence which proved that the complainant was defiled.

I find that his ground is without merit.

ON Ground IV; the appellant faults the trial court for failure to present key witnesses by the prosecution.

I have considered this application and I reiterate and the offences of this nature the court can rely on the evidence of the complainant without requirement of corroboration by a witness save for medical evidence in this case the and the proviso of Section 124 of Evidence Act and the medical evidence must be borne in mind as Section 143 of the Evidence Act which provides that in the absence of any requirement by a provision of law no particular number of witnesses shall be required for the prove of any fact.

Failure to call the alleged witnesses, is immaterial as there was no requirement under the law to call the witnesses. The evidence of Pw1, Pw2 and PW3 was found to be trustworthy by the trial court who found that they had no issue with the appellant.

From the evidence of Pw6 who was the investigating officer at Page 25 of the record from line 17 the investigating officer stated that she decided to rely on evidence of minor and complainant's parent. Maina refused to testify and she later learnt that he is a friend of the accused.

The evidence of the witness in the circumstances was of no probative value.

The evidence tendered by the witnesses who testified was sufficient.

GROUND NO. SIX The accused alleges that the trial magistrate failed to consider whether there was a grudge between the accused and one of the witnesses namely Maina. I need not say much on this ground as I have already addressed the issue of witnesses. This ground is without merit, and said Julius Maina was not called as a witness.

The trial magistrate considered that the defence of the appellant and the court found that there was no nexus between PW1, PW2

and Maina.

From the evidence of PW2 she could not discern any acrimony because PW2 considered the accused as his friend, and on the material date had spent time with him.

The trial magistrate considered the issue and arrived at a proper finding based on the evidence which was tendered before her.

Having considered the evidence tendered by the prosecution I find that the evidence tendered against the appellant was overwhelming and the trial magistrate arrived at an evitable conclusion which is that of guilt of the appellant.

At the time of hearing of his appeal the counsel for the appellant Mr. Warutere addressed the court on the issue of mandatory sentence and he submitted that the court should not uphold the sentence as it is unconstitutional in view of the decision of the Supreme Court in The Case of; **Francis Karioko Muruatetu -verus- Republic (2016) Eklr.**

He submits that he be given an opportunity to mitigate and he further prays that the file be sent to the lower court for hearing on the issue of sentence.

In response Mr. Ashimosi for the respondent submitted that he had looked at the proceedings from page 45 of the record and it shows that the appellant was given an opportunity to mitigate and this is not therefore a case that can be referred back to the trial magistrate. Supreme court in the case of Muruatetu dealt with the mandatory nature of the sentence.

That life imprisonment under the sexual offences act borders on the so called minimum and mandatory maximum.

That the Supreme court steered clear of making a decision on that as it affects various other Sections. Unless there is a Constitutional Petition to declare it unconstitutional. The court cannot declare it.

I have considered the issue page 45 of the record shows that the appellant was given an opportunity to make mitigation and he proceeded to give his mitigation.

The trial magistrate considered the mitigation but while sentencing the appellant noted that her hands are tied and sentenced the accused to life imprisonment. In the case of; Muruwatetu the court stated that for avoidance of doubt the sentence re-hearing we have allowed applies only for the two petitioners herein. In the meantime the existing or intending petitioners with similar cases ought not to approach the supreme court directly or await appropriate guidelines for the disposal of the same.

The Attorney General is directed to urgently set out a frame work to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence, which is similar to that of the petitioner in this case and so the Supreme court judgment seems to suggest that save for Muruwateu and his co-petitioners all other existing petitioners with similar cases will have to wait the outcome of the taskforce. However, the court of appeal in the case of; **William Ongugu Kitini -vrs- Republic (2018) eklr** expressed itself as follows;

The decision of the supreme court only discourage persons from filing petitions to the supreme court but the decision does not prohibit court below it from ordering sentence rehearing in a matter pending before this court. By Article 163 (7) of the Constitution the decision of the Supreme court has immediate and bidding effects on all other courts.

The decision of the supreme court opened the door for review of death sentences even in finalized cases and in the case of; **Michael Kithewa Liechena & Another -versus- Republic (2018) eKLR** stated that by re-sentencing the court would be merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence.

It should be noted that in this cases the court was dealing with the mandatory nature of the death sentence.

In the case of; **Abdalla Kahaso Kobe -versus- Director of Public prosecution (2020) eklr** where the trial magistrate was considering a petition filed a petitioner who was convicted under section 8 (4) of the Sexual offences act and challenging the minimum sentence of 15 years imposed on him. The court stated as follows;-

> **"By prescribing mandatory sentences the act takes away a courts discretion to impose a sentence it considers inappropriate, however sentencing trends in defilement matters in a case of transition there had been a marked paradigm shift by the courts in recent years on treatment in sentencing for this kinds of crimes with fervent calls for consideration of each case by its own circumstances."**

I have considered this issue and I find that the sexual offences act has provided for severe sentences to send a strong message to the offenders to discourage the offence. In this case Section **8 (1) (3) of The Sexual** offences act provides that;

> **" a person who commits an acts which causes penetration with a child is guilty of an offence termed defilement,**
>
> **a person who commits an offence of defilement with a child between the age 12 and 15 years is liable upon conviction for imprisonment for a term of not less than 20 years."**

The trial magistrate imposed a sentence of life imprisonment and therefore the sentence was wrong in view of the sentence provided under the sections under which the appellant was charged and in the circumstances there is no provision to refer the appellant to the lower court for re-sentencing.

It is for this court to consider the issue raised on the sentence and deal with it as the Appellate court in which case I would set aside the sentence of life imprisonment and substitute it with a sentence of 20 years imprisonment.

The sentence be computed from the date of his arrest on 14th May, 2018 as provided under section 333 of Criminal procedure code as he had not been released on bond and bail.

The upshot is that the appeal on the sentence succeeds. The appeal lacks merit and is dismissed.

Dated, signed at Kerugoya this 29th day of May 2020.

L.W. GITARI

JUDGE